IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1032 OF 2001

IN

MISC.PETITION NO.74 OF 1998

IN

PETITION NO.653 OF 1990

...

Bharti D.Goragandhi ...Appellant

v/s.

Jayesh D. Goragandhi

and ors. ...Respondents

...

Mr.A.Y.Bookwala, Sr.Counsel with Ms.S.Jain and Mr.K.P.Madhusudan Nair for the Appellant.

Mr.Anand Grover with Mr.J.J.Shah for Respondent No.1.

Mr.J.G.Damani, Respondent No.4 in person.

Ms.Alka Ghone for Respondent No.5.

Mr.Dilip Rai i/b Aruna Singh for proposed Respondent No.6.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 18TH OCTOBER, 2007

P.C.:

1. By this Appeal, the Appellant challenges the order dated 4th May, 2001 passed by the learned single Judge of this Court in Misc.Petition No.74 of 1998. That petition was filed by the present Appellant for revocation of the probate granted in Probate Petition No.653 of 1990. Probate Petition No.653 of 1990 was filed by the present Respondent No.1 Jayesh Goragandhi and the present Appellant for probate of the Will alleged to have been left behind by one Dhanesh Goragandhi, who was the husband of the present Appellant. Dhanesh, the husband of the present Appellant died on 13-10-1990. The Probate Petition was filed by his widow, the present Appellant and his son the present Respondent No.1.

In that Probate Petition, daughters of Dhanesh, who are Appellants in the connected Appeal being Appeal No.925 of 2002 had filed consent affidavit. As there was no contest, the probate of the Will was granted.

2. Misc.Petition No.74 of 1998 was taken out by the present Appellant for revocation of that probate. The principal allegation in the petition was that her signatures on the probate petition and other documents were obtained by her son Jayesh and a lawyer by name Damani by making misrepresentation and playing fraud and taking advantage of her weak mental and physical condition immediately after the sudden demise of her husband. In the Probate Petition there were allegations made against the lawyer Damani. The learned single Judge dismissed the petition and declined to revoke the probate by the order which is impugned in the Appeal. One of the reasons given by the learned single Judge for dismissing the petition for revocation of the probate was that though adverse allegations were made against the lawyer Mr.Damani, he has not been joined as a party to the revocation petition, thus, in his absence the allegation of fraud and misrepresentation made against him in the revocation petition cannot be inquired into.

3. When the Appeal was being heard on the last occasion, the learned Counsel appearing for the Appellant submitted that the Appellant is willing to join the lawyer Mr.Damani as a party in the revocation petition, so that the allegations against him can be enquired into. Thereafter, the draft amendments along with the affidavit supporting the draft amendments has been submitted before us.

4. The amendments sought is that the advocate Mr.Damani is being joined as a Respondent in the Revocation Petition and additional grounds are being raised in support of the case of the Appellant that the probate is liable to be revoked. In the draft amendments, two other persons namely attesting witnesses to the Will are joined as Respondents, but the learned Counsel appearing for the Appellant, at the out set, stated that the Appellant does not want to join attesting witnesses as Respondents and that the allegations that have been made in the draft amendments against them are also not being pressed.

5. Thus, in principal, the draft amendment is for the purpose of joining the advocate Mr.Damani as a

Respondent and for raising additional grounds in support of plea of revocation of the probate. The Appellant is also placing the correspondence exchanged between the parties, including the lawyer, on record.

6. The request of the Appellant for permission to amend the revocation petition is opposed by the son of the Appellant, Jayesh Goragandhi as also by the lawyer Mr.Damani to whom the notice of draft amendment has been given.

7. The amendment is opposed by the advocate Mr.Damani, who appears in person, on the ground that the draft amendment should not be entertained and that the Appellant should be required to take out a Chamber Summons for effecting the amendment.

8. The amendment is opposed by the original Petitioner Mr.Jayesh Goragandhi on the ground that there is delay involved in making the application for amendment in the revocation petition. The learned Counsel appearing for the original Petitioner relied on the judgment of the Supreme Court in the case of Shiv Gopal Sah alias Shiv Gopal Sahu v/s. Sita Ram

Saraugi & ors., AIR 2007 SC 1478.

9. Now, considering the application made for amendment in the revocation petition, firstly the application has been made at the appellate stage and there is no doubt that there is delay in making the amendment. In our opinion, still the amendment deserves to be granted. One of the grounds on which the revocation petition was rejected by the learned single Judge was that though there are pointed and serious allegations made against the advocate Mr.Damani in the revocation petition, still he has not been joined as a party and therefore, those allegations cannot be enquired into in his absence. The Appellant by the amendment is joining advocate Mr.Damani as a party. Therefore, the amendment is being made so that the advocate Mr.Damani will get an opportunity to explain the serious allegations that have been made against him. In our opinion, when serious allegations are made against the lawyer by the party, the court should exercise its discretion in favour of permitting an inquiry into those allegations, so that the lawyer gets an opportunity to clear his name. Avoiding an inquiry into allegations which are of serious nature against the

lawyer will not be in the interest of the system. The Supreme Court in its judgment in the case of Shiv Gopal Sahu, referred to above has itself referred to its earlier judgment in the case of Dondpati Narayana Reddy v/s. Duggireddy Venkatanarayan Reddy & ors., 2001 (8) SCC 115, where the Supreme Court has held that the amendment should, generally, be allowed unless it is shown that permitting the amendment would be unjust and result in prejudice against the opposite side, which cannot be compensated by costs or would deprive him of a right which has accrued to him with the lapse of time.

10. Now, first taking up the objection raised on behalf of the lawyer Mr.Damani is concerned, there is no question of the amendment resulting in any injustice to him, because of the amendment now he will get an opportunity to show that the allegations made against him have no substance and thus he can clear his name. In our opinion, considering that he is lawyer by profession, he should be eager to clear his name. There is also no question of any prejudice being caused to his interest because of delay, because the Appellant is not claiming any relief against him. He becomes a necessary party not

because any relief is claimed against him, but because serious allegations are made against him and therefore, no prejudice is likely to be caused to the interest of the lawyer Mr.Damani. So far as original Petitioner Jayesh is concerned, as by the amendment no fresh relief is being claimed, there is no question of any relief barred by the law of limitation being claimed against him by the amendments. So far as prejudice being caused to his interest because of delay is concerned, we see that no prejudice is likely to be caused to his interest because of the conduct of the Appellant for making of an application at a later stage, because the probate of the will granted in his favour is still intact and will remain intact till the revocation petition is finally granted. In any case, assuming that there is any prejudice caused to his interest, it is capable of being compensated by awarding costs to him. In our opinion, one more aspect has to be considered, and that is the relationship between the parties. The Appellant is the mother and the Respondent No.1 is her only son. She is making serious allegations against the son and his lawyer Mr.Damani alleging that unfair advantage of her mental and physical condition which was caused because of the sudden

demise of her husband has been taken by her own son. In our opinion, she deserves to be given an opportunity to establish her case, and therefore, we grant leave to the Appellant to amend the petition for revocation in terms of the draft amendment, save and except that portion of the amendment by which two attesting witnesses are to be joined as parties and allegations that may have been made against them in the draft amendment.

11. As we have granted leave to the Appellant to amendment the Revocation Petition, and as now a new party is being added to the Revocation Petition, in our opinion, the order impugned in the Appeal will have to be set aside. We find that though there were allegations of fraud made, no oral evidence was led by the parties. In our opinion, considering the nature of the allegations that have been made, oral evidence should have been led by the parties. The learned Counsel appearing for the Appellant stated before us that the Appellant is willing to lead oral evidence. In our opinion, considering the nature of the allegations that have been made, considering the relationship between the parties and also considering that now serious allegations have been made against

the lawyer, who is joined as a party, it will be appropriate for the court to decide the petition for revocation after permitting the parties to lead evidence, both documentary & oral.

12. In the result, therefore, the Appeal succeeds in part and is allowed. The order impugned in the Appeal is set aside. The Appellant is directed to pay costs of Rs.1000/- to the Respondent No.1. Misc.Petition No.74 of 1998 is remitted back. The Appellant, who is Petitioner in the Misc.Petition No.74 of 1998, is permitted to carry out amendment as directed above in the petition. The amendment to be carried out within a period of eight weeks from today. The learned single Judge, after permitting the parties to complete their pleadings is requested to permit the parties to lead oral and documentary evidence, and thereafter decide the petition afresh in accordance with law.

. At the request of the learned Counsel appearing for the original Petitioner-Jayesh, operation of this order is stayed for a period of six weeks from today.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)